Answers for Poor Barbara Hodge, *and her Husband, to the Bill given in against them*

By

John Gibson *Writer in* Edinburgh

THE Deceast *James Hodge* Brother to the said *Barbara*, having made and Subscrived a Disposition dated the 10th. of *October* 1679 bearing him for summs of Money and other Onerous Causes, to have sold and disponed to *John Gibson* Writer in *Edinburgh*, the half of a Tenement of houses lying in St. *Ninians Raw*, and another Tenement lying upon the south side of the high Street, near to the *West-Port*, pertaining to the said *James*, the Friends and near Relations of *James*, perceiving how the poor man (who was known to be fatuous and not *Compos Mentis*) was ruined by granting the forelaid Disposition of his whole Fortune, without any Onerous Cause, However the Disposition be otherwayes Conceived, but being Loath to rub that Affront upon him and themselves, as to take out a Brieve of Idiotry for Trying by an inquest, his Furiosity or Fatuity, They did therefore betake themselves to an other Method by intenting Reduction and Improbation of the foresaid Disposition, as being Elicit from the said *James Hodge* when he was extreamly Drunk, and that without any Onerous Cause; But Mr. *Gibson* who knew how easily he had obtained the foresaid Disposition, applyed himself to the poor Fatuous person, and procured from him a Disclamation of the foresaid Process, and with all being Conscious to himself of the Lameness of his Right, not thinking himself Secure enough, by the clause in the Disposition, Bearing for certain summs of money, he caused ingross in the foresaid Disclamation a Declaration, whereby the said *James* declared, That he Adhered to a Disposition made by him to the said *John Gibson*, which was granted for Onerous Causes; And that he granted the same to the said *John* with his Blessing. Whereupon the Friends of the said *James* being mean persons, and of small substance, gave over the pursute. And the poor Fatuous Creature lived some time thereafter, miserably in this Country: But *John Gibson* never thinking himself Secure, whilest the Disponer remained in this Kingdom, Did *viis & modis*, procure him to be Transported thereof, thinking thereby to put a full end to all Debate in this matter. At length the said *Barbara Hodge* hearing of her Brothers Decease, Procured her self to be Served and Retoured Heir to him in the foresaid half Tenement, and hath raised Reduction and Improbation of the foresaid Disposition, In which process the Terms being Run, and a Warrand Obtained for Discussing the Reasons in the Outter House, she insisted to Reduce the same, upon these Reasons.

Imo, Because the said *James Hodge* was Fatuous, Furious, or not *Compos mentis*, the time of granting the foresaid Disposition.

2do. Et separatim, Because tho he was not absolutely Fatuous and Furious; Yet his Simplicity and Levity, was in such a Degree, that it could scarse be distinguished from Fatuity or Furiosity; And therefore the said Disposition, Elicit by the said *John Gibson*, who knew him to be such a person, ought to be Reduced, *ex capite Fraudis*: Especially considering these pregnant Evidences of Fraud on the part of the said *John Gibson*. *Imo*: That this was a Disposition of all that the Disponer had to a meer Stranger, without any Onerous Cause. *2do*: There is no Reservation of so much as a Liferent Right, or an Aliment to the Disponer. *3tio*: The imperating of the forelaid Declaration from the Disponer is a shrewd presumption of Fraud against the said *John*, who distrusting the Validity of the Disposition in his Favours, (tho he had good Reason) thought fit to secure himself by a Declaration, that the same was granted for Onerous Causes. *4to*. He hath never sought after the possession of one of the two Tenements disponed, tho the Rents thereof be very considerable; And though it be disponed for Onerous Causes to him, in the same manner, as the other half Tenement, which certainly he would not have ommitted, if he had payed a price for the Tenements disponed, *5to*. The said *John Gibson* made the Granter of the Disposition so exceeding Drunk, that if when he was sober, he had any spunk of Reason, the same was wholly extinguished by Excessive Drinking.

The Lord Ordinary after hearing both parties, Before Answer, allowed the pursuer to adduce what Probation he can, anent the Qualifications of Fraud and Circumvention in Eliciting the Disposition Quarrelled; As also, to prove the Special Condescen-

dance given in by her in the several particulars, for Eliding her Brothers Folly, and Weakneis, Fatuity or Furioſity, ſuch as that he could not Comb his Head, nor put on his Cloaths, and that when he got money, he would throw it away in the Streets; Unleſs ſome perſon would take it from him, that he would have gifted a houſe or Diſcharged a houſe Rent for a pennie or two, and that he went through the Streets, throwing ſtones amongſt the Children, and tearing the Cloaths of himſelf, &c. And Further allowed the Defender likewayes to prove before Anſwer, for Eliding the foreſaid Condeſcendance, for ſuſtaining his Diſpoſition, that theſe Acts of Weakneſs and ſimplicity, were when he was Young, and long anteriot to the Diſpoſition; ſome Arayingſonner or leatter to the uſe of their Reaſon then others, and they might be the Product of Ills or Drunkenneſs, and that in ſundrey intervals he Acted Rationly, and others Bargained with him as well as the Defender, and that he went abroad, and was advanced to be a Serjeant, which truſt he could not have gotten, if he had been Either Fatuous or furious, and any other adminicls he can adduce, to fortifie his Diſpoſition, Reſerving alwayes to the Defender at the advising of the probation, to be heard how fart tragal can be taken of one, Fatuity or Furious after his death, when the ſame was not Cognoſced by an Inqueſt in his Lifetime, and how fare an Diſpoſition can be taken away by witneſſes, Eſpecially where its Narative is *per ſe probative*, of the Onerous Cauſe, it not being betwixt near Relation but Strangers, and being perfected, by Infeftment and Corrobrat with 18. years peaceble poſſeſſion, before the intenting of this Reduction, and granted Diligence to either parties. Againſt which Interlocquitor *John Gibſon* hath Reclaimed by a Bill, wherein he Muſters up ſeveral pretended Arguments, againſt the Relevancy of the Purſuers Reaſons of Reduction, which I ſhall endeavour to Anſwer in a few words without Repetition.

In the preface he Repreſents, how Cautious he was in taking a Diſcharge of 50 *Pound Sterling* from the ſaid *James Hodge*, which he ſayes was the price of the foreſaid half Tenement of Land, and the Onerous cauſe of the foreſaid Diſpoſition.

To which its Anſwered, That this doth clearly redargue the Clauſe of the Diſpoſition, bearing the ſame to be for ſumms of Money, ſince not only the foreſaid half Tenement, but alſo a more conſiderable Tenement, lying at the Weſt-port, is therein diſponed, and yet he Acknowledges, that the only Summ he payed, was fifty pound *Sterling*, which he ſayes, was the Adequat price of the half Tenement; So that he Received the Diſpoſition of the other Tenement for nothing, which evidenſly Demonſtrates, that there is no ſtreſs to be laid upon the foreſaid Clauſe, which is falſe by his own Confeſſion.

Thereafter for further Supporting the Onerous Cauſe of the foreſaid Diſpoſition, he founds upon a Declaration, granted be the ſaid *James*, wherein he Acknowledges, that the Diſpoſition was for an Onerous Adequat Cauſe; So that he hath a three fold Security, as to that point.

To which its Anſwered, That he might have eaſily procured any Diſcharge or Declaration he pleaſed from the poor Fatuous perſon, and *nimia cautela eſt certum fraudis indicium*, Eſpecially conſidring that *John Gibſon*, who was a Writer, could not be ignorant, that a Diſpoſition bearing to be for Onerous Cauſes, doth in Ordinarie caſes, ſufficiently prove the Onerous Cauſe, ſo that his Multiplying Securities, as to this point, was the Native effect of his Juſt fears, leſt the Trick ſhould be Diſcovered.

As to his firſt Reaſon againſt the Relevancy of the Condeſcendance upon the Acts of Fatuity, *Viz.* That writ can not be taken away by Witneſſes. Its anſwered though this be a Rule in our Law, yet it admits of many Exceptions, for when Contracts, Diſpoſitions, &c. are Reduced upon the Head of Fraud, Probation by Witneſſes, is alwite ſuſtained; As alſo, if a Pupil without conſent of Tutors, or a Minor without conſent of Curators, ſhould grant Bonds, or make Diſpoſitions, &c. The ſame may Unqueſtionably be Reduced, and Declared Null upon Probation by Witneſſes; And there can be no Caſe more Favourable, then the preſent caſe, and when Idiotry and Furioſity, is Cognoſced by an inqueſt, That Probation in that caſe, is not ſufficient by Witneſſes, was never yet called in Queſtion, and there is equal Reaſon that the ſame ſhould be ſuſtained before the Lords, who are the great inqueſt in Civil affairs.

His 2d. Reason is founded upon the 66. *Act: Parl:* 8. K. *James* 3d. by which he contends, that a person most be first found, and Declared Idiot, by an inquest before any Disposition made by him, can be Reduced upon that Heed.

To which its Answered, That the Act of Parliament ordains only *Brieves of Idiotrie* to be Reformed, and a new Clause to be put therein, but doth not at all determine that Idiotrie or Furiosity, can only be Cognosced by an inquest, in order to the Reducing of deeds of such persons, and not by Reduction before the Lords of Session, without the preceeding Cognition of an inquest. 2*do*. Such Reductions have been frequently sustained by the Lords, particulary in the Case *Loch* contra *Dyke* in *Anno* 1638, &in the Case of the *Kinnires* in *Anno* 1633, and in the year 1669 betwixt *Stuart* of *Grantully* and *innernytie*, and *in Anno* 1672, betwixt *Elizabeth Lundie* and *Maurice Trent*, and in *December* 1693 betwixt one *Dixon* and the Children of *Andrew Duncan*, in all or most of which cases, the Furious and Fatuous person was dead before intenting of the Reduction, nor was their any veredict of an inquest preceeding the said action, and in Several of these Cases, the Writs quarrelled were Concerning an Heritable Subject, and there is not a shaddow of Reason, for distingwishing in this Case betwixt Moveables and Heritables, as the Defender doth, for generally the prejudice sustained, is far greater in Heritadge then in Movables, and therefore Reductions of Allenations of the Heritage of Furious Persons ought rather to be sustained, Especially when the debate is with the Receiver of the Disposition, what ever might be pled for a singular Successor, who *Bona Fide* and *for Onerous Causes*, had bought the Lands from the Receiver of such a Disposition. And if Reduction upon the Heed of Idiotry and Furiosity, could not be sustained at the instance of the Heirs of such persons, as is pretended by the Defender, in his third and fourth Reason. This would be a great Temptation to all persons, whose inclenations leads them to take advantage of their Neighbours, to Elecit Dispositions, from Fatuous or Furious persons, knowing that if by a Lucky chance, they should dye before their Idiotry were Cognosced by an inquest, the purchase would be secure, and their Right would never be called in Question thereafter, which is so manifestly unjust and absurd, that no Law can Countenauce or favour such a Case, which fully Answers the 3*d*. 4*th*. 5*th*. and 6*th*. Reason.

As to his 7th: Reason, Its highly calumnious, and very injurious to the Lord Ordinary, For the Defender insinuates, that he sustained the Alledgance of Levity and Weakness to be a Relevant Ground of Reduction, whereas it is clear from the foresaid Interloquitor, which is *verbatim* repeated, that he only allowed the pursuer before Answer, to prove the Levity and Weakness of the Disponer, together with the other Qualificarions of Fraud condescended upon.

And whereas its pretended. That the Granter of the foresaid Disposition, was a Skilful Tradsman, And thereafter became a Souldier, and was Advanced to be a Serjeant.

It is Answered, That the same is most false, And its offered to be proven by the Souldierswhich were in *Flanders*, when he was in the Campt, that he went up and down amongst them as a Fool, And was alwise Nicknamed, Daft or Mad *Hodge*. Besides though he might in some Lucide intervals perhaps been taken on to be a Souldier, as several Fools and Mad Men have been, which yet is absolutely false, so far as the pursuer can learn; Yet that could never have any weight to Eliede the pursuers condescendance, concerning manifest acts of Fatuity or Furiosity, about the time of his making the foresaid Disposition.

And whereas the Defender pretends, That he has been Eighteen years in peaceable possession of the Tenements disponed, without interruption, The same is likewise manifestly false, For by his own acknowledgement, the Disposition is dated in *October* 1679, And by the Declaration produced by himself; its evident that the Disposition was Quarrelled by Reduction and Improbation, within a few yeats thereafter, And the present Proces was raised in the Year 1693, so that its false to pretend, That he was long in peaceable possession.

In Respect wherof, &c.